No. _____

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In the Supreme Court of the United States

ODYSSEY CONTRACTING CORPORATION
and ODYSSEY PAINTING COMPANY, INC.,
Petitioners,

v.

MARYLAND CASUALTY COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The Pennsylvania Compensation Rating Bureau, ("PCRB") is a rating organization which adopted a written appeals procedure as mandated by the provisions of 77 P.S. § 1035.17. The PCRB's appeals procedure was set forth in Rule XVI, entitled "Appeals From Application of the Rating System Procedure." Rule XVI mandated that an aggrieved party had to make its written request for review within 12 months of the policy period in which the application was made. Rule XVI was not officially promulgated as an administrative regulation. It was included in the private publication of the PCRB known as the Pennsylvania Workers' Compensation Manual of Rules, Classification & Rating Values for Workers Compensation and for Employers Liability Insurance. (the "Manual").

The State courts enforced Rule XVI against the policyholders who failed to comply with its provisions. As a consequence, the petitioners were denied the opportunity to defend a contract action which sought to collect alleged unpaid premiums exceeding $140,000.00 and pursuit of a counterclaim. The petitioners contend that they have been deprived of their property without due process of law guaranteed by Section 1 of the Fourteenth Amendment to the Constitution of the United States.

The question presented is as follows:

1. Whether enforcement of a Workers's Compensation statute, 77 § 1035.17 and the unpublished PCRB' Manuals Rule XVI which sets forth rules and procedures for filing appeals before the rating organization, deprives petitioners of their property without due process of law, in violation

of Section 1 of the 14th Amendment to the Constitution of the United States.

LIST OF ALL PARTIES TO THE PROCEEDING IN THE COURT WHOSE JUDGMENT IS SOUGHT TO BE REVIEWED

Petitioner: Odyssey Contracting Corporation

Petitioner: Odyssey Painting Company, Inc.

Respondent: Maryland Casualty Company

CORPORATE DISCLOSURE STATEMENT

Neither Odyssey Contracting Corporation nor Odyssey Painting Company, Inc. have any parent corporation. No publicly held companies hold 10% or more of the corporations' stock.

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CITATION OF THE OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINIONS AND ORDERS ENTERED IN THE CASE BY THE COURTS

The Memorandum and Order of the Trial Court entered June 15, 2004, granting judgment on the pleadings, is unreported, but is contained in Appendix A.

The Trial Court's denial of the Motion for Reconsideration entered July 14, 2004, is unreported but is contained in Appendix B.

The Superior Court of Pennsylvania's Order entered July 19, 2005, withdrawing its July 12, 2005 opinion is reported at 2005 Pa.Super 257, 2005 Pa.Super LEXIS 2233 and is contained in Appendix C.

The Superior Court's Opinion entered on February 9, 2006 affirming the grant of judgment on the pleadings is reported at 2006 Pa. Super. 25, 2006 Pa.Super. LEXIS 64, 894 A.2D 750 and is contained in Appendix D.

The Superior Court's Order of Court entered April 17, 2006 denying an Application for Reargument, is reported at 2006 Pa.Super. LEXIS 614 and is contained at Appendix E.

The Supreme Court of Pennsylvania's Order, entered November 1, 2006, denying petitioners' Petition for Allowance of Appeal, is reported at 909 A.2d 1290, 2006 Pa.LEXIS 2099 and is contained at Appendix F.

JURISDICTION

The judgment of the Supreme Court of Pennsylvania was entered on November 1, 2006. The jurisdiction of this Court

is invoked under 28 U.S.C. § 1257(a). This petition is timely filed. 28 U.S.C. § 2101(c). 28 U.S.C. § 2403(b) may apply, and this Petition for Writ of Certiorari shall be served upon the Attorney General of the Commonwealth of Pennsylvania.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED IN THIS CASE

Constitution Provision Involved

"No State shall....deprive any person of ....property, without due process of law." *USCS Const. Amend. 14, § 1*.

Pennsylvania Statute Involved

§ 1035.17. Requests for review; appeals to commissioner

(a) Each rating organization and every insurer to which this article applies which makes its own rates shall provide within this Commonwealth reasonable means whereby any person aggrieved by the application of its rating system may be heard in person or by the person's authorized representative on the person's written request to review the manner in which such rating system has been applied in connection with the insurance afforded the aggrieved person. For the purposes of this section, "reasonable means" shall include at least the following:

(1) A committee to hear the appeals of aggrieved persons which is comprised of an equal number of representatives of employers and insurers.

(2) If travel is required for the aggrieved person to be heard in person, reimbursement to the aggrieved person for reasonable travel expenses.

(b) If the rating organization or insurer fails to grant or reject the aggrieved person's request within thirty (30) days after it is made, the applicant may proceed in the same manner as if the application had been rejected.

(c) Any party affected by the action of that rating organization or insurer on the request may, within thirty (30) days after written notice of that action, make application in writing for an appeal to the commissioner, setting forth the basis for the appeal and the grounds to be relied upon by the applicant.

(d) The commissioner shall review the application and, if the commissioner finds that the application is made in good faith and that it sets forth on its face grounds which reasonably justify holding a hearing, the commissioner shall conduct a hearing held on not less than ten (10) days' written notice to the applicant and to the rating organization or insurer. The commissioner, after hearing, shall affirm or reverse the action. *77 P.S. § 1035.17*

Underwriting Rule of the Pennsylvania Compensation Rating Bureau

RULE XVI – Appeals From Application of the Rating System Procedure

A. Any person, corporate or otherwise, aggrieved by an application of the rating system of the Pennsylvania Compensation Rating Bureau..... must commence any

appeal of an application of the rating system within twelve (12) months of the policy period in which the application was made by filing an appeal directly with the Bureau in accordance with this Procedure. [the full text of this section is contained in Appendix H].

No citation is available since the provision is contained only in the "Pennsylvania Workers' Compensation Manual of Rules, Classification & Rating Values for Workers Compensation and for Employers Liability Insurance" (the "PCRB's Manual"), a private publication. The full text of the Rule XVI is set forth in Appendix I.

CONCISE STATEMENT OF THE CASE

Before the Trial Court

Maryland Casualty Company issued a Worker's Compensation Insurance Policy (the "Policy") to Odyssey Contracting Corporation and Odyssey Painting Company, Inc., (collectively "Odyssey") for the policy period 01/01/99 to 01/01/00. The Odyssey corporations were Pennsylvania based-employers involved in the bridge painting business in various states.

The Policy contained rate schedules for each state. Each states' rate schedule included in the Policy incorporated a federal and state rates for the classifications of labor listed. Calculation of the final premium due under the insurance contract involved a factual determination whether the actual work performed by employees during the policy year occurred in either the federal or state jurisdiction, in which event the relevant rate already contained in the policy would be applied to the employers' payroll expense. The final

premium due under the policy was to be determined by audit conducted by the insurer after the close of the policy year.

Maryland sued Odyssey by filing a complaint more than 12 months following the end of the policy year. It claimed that the final premium due as determined by audit was $336,321.00 less a credit for payments of $195,793.00, leaving a balance due of $140,528.00 for which it sought judgment.

Odyssey defended the action by alleging that the actual premium due was $244,342.00 of which $242,892.00 had been paid, leaving an unpaid balance of $1,449.01, which sum was offset by other sums due Odyssey.

It its response to Maryland's complaint, Odyssey also filed a counterclaim alleging a statutory bad faith action against Maryland under 42 Pa.C.S. § 8371. Odyssey sought recovery of punitive damages, attorney's fees and costs on the basis that Maryland breached its fiduciary duty and duty of good faith and fair dealing by conducting a fraudulent final audit by knowingly using the higher federal rates in circumstances where the lower state rate should have been applied.

Maryland filed a Motion for Judgment on the Pleadings relying upon the statutory provision set forth in 77 P.S. § 1035.17 and Rule XVI set forth in the Pennsylvania Compensation Rating Bureau's ("PCRB") Manual contending that Odyssey, as a "person aggrieved by the application of the [Bureau's] rating system," should have pursued the matter before the Pennsylvania Compensation Rating Bureau. According to Maryland, Odyssey should have pursued its appeal of the application of the rating system within the 12-month period following the close of the policy year. Maryland argued that Rule XVI had the force of law.

Odyssey argued that Rule XVI was not promulgated in the law, nor in the code of regulations, nor mentioned in the Policy and should not be enforced as legally binding.

The trial court rejected Odysseys' view and concluded that Rule XVI was the rating organization's response to the statutory provision 77 P.S. § 1035.17 (a) which required that rating organizations to provide a procedure for review of claims by any aggrieved person as to the application of insurance rates. According to the trial court, Rule XVI provided a full, complete and adequate remedy. The Trial Court thus concluded that it lacked the power to exercise jurisdiction over the contract dispute, and on June 15, 2004, granted the insurer's Motion for Judgment on the Pleadings in the amount of $140,528.00 (See the Memorandum and Order, Appendix H).

The trial court never addressed the issue of the unconstitutionality of the statute or Rule XVI. The Trial Court was asked to reconsider its decision, but it declined to do so (See Exhibit B).

Before the Superior Court of Pennsylvania

A timely appeal to the Superior Court of Pennsylvania followed. Since the constitutionality of a the workers compensation statute and the "PCRB's Manual procedure Rule XVI were called into question, notice was provided to the Attorney General of the Commonwealth of Pennsylvania, who chose not to participate in the proceedings before the Superior Court.

On February 9, 2006, the Superior Court affirmed the Trial Court's grant of Judgment on the Pleadings, and its Opinion, is contained at Exhibit C.

The Superior Court agreed with the Trial Court's rationale and reliance upon Rule XVI of the PCRB's Manual. It upheld the constitutionality of 77 P.S. § 1035.17 and concluded that Rule XVI was legally enforceable, holding that petitioners had not directly challenged its constitutionality.

On April 17, 2006, the Superior Court refused reargument and its Order is contained in Exhibit E.

Before the Supreme Court of Pennsylvania

A timely Petition for Allowance of Appeal was filed with the Supreme Court of Pennsylvania. Notice was again provided to the Attorney General of the Commonwealth of Pennsylvania, who chose not to participate in the proceedings before the Supreme Court.

The Supreme Court of Pennsylvania's Order of November 1, 2006, denying Odysseys' Petition for Allowance of Appeal, is contained at Appendix F.[1]

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[1] In the interim the Pennsylvania Compensation Rating Bureau filed a Petition for Leave to file an Amicus Brief in Support of the Petition for Allowance of Appeal, but the Supreme Court denied the request. The Bureau agreed with the policyholders that it was not the forum in which to resolve a contract dispute where the rates themselves were not challenged. It deemed the controversy as a contract dispute, and not a dispute involving the application of its rating system.

REASONS FOR GRANTING THE WRIT

I. PENNSYLVANIA DENIES DUE PROCESS TO PERSONS AGGRIEVED BY THE APPLICATION OF ITS WORKERS' COMPENSATION RATING SYSTEM BY ENFORCING RULES AND REGULATIONS WHICH ARE NOT OFFICIALLY ADOPTED AND PROMULGATED.

Under Pennsylvania's Workers" Compensation Act, persons aggrieved by the application of the rating organization's rating system[2] may file an appeal to the insurance commissioner, but only after complying with an unnamed rating organization's unspecified appeals process. That appeals process was not publically available in any statute, rule or regulation. Yet, it unfairly determined the outcome of this case.

The Workers' Compensation Act, including section 1035.17, which deals with appeals to the commissioner, does not disclose the identity of the rating organization to which reference is made. As discussed, *infra.*, neither this section nor any other statutory provision or administrative regulation provides public notice that the identity of the relevant rating organization is the Pennsylvania Compensation Rating Bureau. Thus, any aggrieved person seeking to follow the appeals procedure, will have an initial impediment to the inquiry, since it will not be known whose procedures are being sought. Section 1035.17 merely informs that a

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[2] Pennsylvania permits insurers to function as rate-makers, and they are accorded the same duty as a rating organizations. This distinction is not pertinent to the pending controversy.

procedure exists and that some unspecified process must be followed as a pre-requisite to appeals to the commissioner.

In upholding the constitutionality of the section 1035.17 of the Workers Compensation Law, the Superior Court of Pennsylvania described a methodology, which if followed, would ostensibly lead the aggrieved person to the Pennsylvania Compensation Rating Bureau and its manual of rules, including Rule XVI containing 12-month limitation period. The methodology which the Superior Court assured would render the process constitutional was as follows:

> It is clear on the face of section 1035.17 that the rating organizations must establish "reasonable means" to hear grievances and that the insurance commissioner is required, upon request, to review any action taken pursuant to the filing of any such grievance. The fact that rules will be promulgated to effectuate this grievance procedure is implicit in section 1035.17 and the other provisions of Chapter 7B of the Workers Compensation Law." (Appendix 19a).
>
> 77 P.S. § 1035.17. This section does not stand alone and must be read *in pari materia* with all of the related provisions set forth in Chapter 7B of the Workers' Compensation Act which also deal with insurance rates. **See** 77 P.S. §§ 1035.1-1035.22 (setting forth legislative provisions established to protect policyholders and the public against adverse effect of excessive, inadequate or unfairly discriminatory rates). (Appendix 18a).

Further, the Superior Court instructs that Chapter 7B must be interpreted in accordance with the provisions of Title 45 Sections 1102 *et seq.* (pertaining to legal notices and

advertisements of agency rule making and the adoption of regulations by administrative agencies). See also 2 Pa.C.S.A §§ 101-754 (Administrative Law and Procedure); 1 Pa. Code Chapter 7 (setting forth procedures for adoption or change of administrative agency regulations); 1 Pa Code Chapter 11 (establishing procedures for preparation of notices, rule making proposals and unpublished regulations for administrative agencies); 31 Pa. Code § 56.1 (indicating that with certain exceptions 1 Pa. Code §31.1 and 1 Pa. Code Part II (relating to general rule of administrative practice and procedure) apply to proceedings before the Insurance Department). (Appendix 19a).

While the court's recommended methodology appears reasonable, conducting such a review does not lead to the Pennsylvania Compensation Rating Bureau, nor to its manual containing the appeals process, Rule XVI. Such a review actually demonstrates that the commissioner and the rating organization both failed to comply with the statutory and regulatory process to promulgate rules to implement a statute and adopt binding regulations.

Firstly, the twenty-one enumerated sections set forth in Chapter 7B speak generically of "rating organizations." For example, a rating organizations is subject to supervision and to examination by the commissioner, (section 1035.3); it shall file filings, and that the Secretary of Labor and Industry shall be a member of its board of directors or governing body (section 1035.5); that its filings are open to public inspection (1035.6); that its membership shall consist of each and every workers' compensation insurance carrier doing business in Pennsylvania subject to the provisions of the Workers' Compensation law (section 1035.7).

In other words, the rating organization contemplated by the Workers' Compensation Law is to be a private corsortium of insurance carriers, subject to the supervision of the commissioner, on whose board sits the Secretary of Labor and Industry.

Section 1035.7 also defines the relationship between an insurer and its rating organization, and the duties of the rating organization, which include developing and filing rules reasonably related to the recording and reporting of data pursuant to the uniform statistical plan, the uniform experience rating plan and the uniform classification system. Section 1035.9 deals with the commissioner's review of rate filings made by rating organizations while section 1035.12 advises that rating organizations are to be licensed by the commissioner.

In section 1035.17, which is the subject of this challenge, rating organizations are given the statutory task to formulate the appeals process whereby aggrieved persons are provided a remedy to have their grievances heard before the rating organization as a prelude to an appeal to the insurance commissioner. No other provisions in Chapter 7 speaks to the subject of appeals, or to the rules which govern the appeals process.

What does clearly emerge from a review of Chapter 7B, however, is that the rating organization contemplated by the act is to be intertwined with the State, to such an extent that when it acts, its act constitutes state action as shall be more fully developed, *infra*.

The Superior Court also reasoned in its opinion that the Workers Compensation Law withstood constitutional challenge because the *in pari materia* review would also

consider other Pennsylvania law and administrative procedures. These additional sources would ostensibly provide the constitutional underpinnings to support the Workers' Compensation law, section 1035.17, and Rule XVI set forth in the PCRB manual. Here again, the results of the review do not lead to the Pennsylvania Compensation Rating Bureau nor to its Manual. To the contrary, such a review makes clear that the insurance commissioner, and/or its licensed rating organization, the PCRB, have completely failed to promulgate the appeals rules set forth in Rule XVI in accord with Pennsylvania law.

The subject matter of, Title 45 (45 P.S. §§ 1201-1208) deal with legal notices and advertisements, and describes the procedure for the official adoption of administrative rules: section 1201 deals with the notice of proposed rule making; section 1202 with the adoption of regulations; section 1203 with the effective date of regulations; section 1204 with the omission of notice of proposed rule making; section 1205 with the approval as to legality of the proposed regulations; section 1206 with the format of regulations and other documents; section 1207 with deposit of agency text of regulations required.

Significantly, under section 1208, unfiled regulations are void.

> An administrative regulation or change therein promulgated after the effective date of this act shall not be valid for any purpose until filed by the Legislative Reference Bureau, as provided in section 409. 45 P.S. § 1208.

Petitioners alleged in their pleadings and throughout the appeals in the State Courts that the PCRB manual, and Rule

XVI, were not contained in the statutory material nor the code. Had the process for adoption of rules and regulations been followed, the appeals procedure set forth in Rule XVI would have formed a part of the Pennsylvania Code. Neither the PCRB nor its manual of underwriting rules would have remained obscure, and the process to perfect an appeal would have been available to anyone who cared to look.

Since the Superior Court could not offer a citation in its opinion with reference to Rule XVI of the Worker's Compensation Manual (since it had not been promulgated in accordance with Title 45), the Superior Court then proceeded to take "judicial notice" of its existence, citing another Pennsylvania intermediate appellate court case with took judicial notice of Worker's Compensation Manual. *Graduate Health System, Inc. v. Pennsylvania Insurance Department, 674 A.2d 367 (Pa. Cmwlth 1996)*. This is an apparent attempt to ground Rule XVI on some legal underpinning.

"Judicial notice" simply means that the Superior Court recognized Rule XVI as being the law to apply in the case, but it begs the question as to whether such a rule was constitutionally defective for lack of being properly promulgated at a time when it mattered to the policyholders.

The Superior Court declared that it had relied upon Rule XVI in reaching its decision. (Appendix at 28a).

"It declared that an "administrative agency" has the power to adopt rules with respect to the administration of a statute when the statute specifically empowers the agency to do so." (Appendix 19a). As noted above, the Pennsylvania Compensation Rating Bureau is not a government entity although the term "Bureau" confusingly connotes that it is accorded the status. If the Superior Court was intending

therefore to take judicial notice of an administrative agency's rules and regulations, it failed in that regard as well.

The Superior Court may have wrongly decided the status of Rule XVI, but its decision, as upheld by the Supreme Court of Pennsylvania, is the state of Pennsylvania law on the subject. In other circumstances where the state has erred in its construction of statutes, the United States Supreme Court has said:

> Whether the state court erred in its construction of the state .... statutes, is not a Federal question. We are bound by the construction which the state court gives to its own constitution and statutes and to the law which may obtain in the State, *W. v. La., 194 U.S. 258, 261 (U.S. 1904)*.

> The limit of the full control which the State has in the proceedings of its courts, both in civil and criminal cases, is subject only to the qualification that such procedure must not work a denial of fundamental rights or conflict with specific and applicable provisions of the Federal Constitution.. *W. v. La., 194 U.S. 258, 263 (U.S. 1904)*.

It is submitted that Rule XVI had precisely that effect: the procedure worked a denial of a fundamental right of due process and conflicted with Section 1 of the 14th Amendment of the Constitution of the United States by depriving the petitioners of their property without due process.

It is undoubtably true that a state can regulate access to its adjudicatory processes, provided that in doing so, it does not breach some fundamental constitutional right.

> "[What] the Constitution does require is "an opportunity . . . granted at a meaningful time and in a meaningful manner," *Armstrong v. Manzo, 380 U.S. 545, 552 (1965)* (emphasis added), "for [a] hearing appropriate to the nature of the case," *Mullane v. Central Hanover Tr. Co., supra, at 313.* The formality and procedural requisites for the hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings. That the hearing required by due process is subject to waiver, and is not fixed in form does not affect its root requirement that an individual be given an opportunity for a hearing before he is deprived of any significant property interest, except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event. In short, "within the limits of practicability," id., at 318, [**787] a State must afford to all individuals a meaningful opportunity to be heard if it is to fulfill the promise of the Due Process Clause. *Boddie v. Connecticut, 401 U.S. 371, 378-379 (U.S. 1971)*

The aggrieved persons had no meaningful way to defend the action or to prosecute their counterclaims. They could not have known that their day in court had already passed, since the process which they were to follow was so wholly obscure to them. Justice requires that the judgment entered be reversed and the case remanded.

II. ALTHOUGH THE ORIGINS OF RULE XVI WERE WITH THE PENNSYLVANIA COMPENSATION RATING BUREAU, THE DENIAL OF DUE PROCESS CONSTITUTED STATE ACTION BECAUSE OF THE STATUTORY DUTIES DELEGATED TO THE BUREAU AND ITS ROLE IN THE REGULATORY PROCESS OF RATE-MAKING UNDER THE WORKERS' COMPENSATION REGIME.

As discussed above, although PCRB is a consortium of private insurance companies who write workers' compensation insurance in the Commonwealth, it is under the supervision of the commissioner, and the Secretary of Labor and Industry is a member of its board. It is thus a hybrid organization, not wholly private, yet not arising to a government agency. As further developed, *supra.*, its role in the rate-making process is exquisitely set forth in Chapter 7B of the Workers' Compensation Law.

This Court has previously enunciated a test to determine whether the action of a private entity can constitute "state action." In American Manufacturers Mutual Insurance Company, et. al., vs. Sullivan, *526 U.S. 40, 119 S. Ct. 977; 143 L. Ed. 2d 130; 1999 U.S. LEXIS 1711 (1999)* this Court declared with regard to a private entity that it:

> will not be held to constitutional standards unless "there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the latter may be fairly treated as that of the State itself." *Ibid.* Whether such a nexus exists, depends on, among other things, whether the State has provided such significant encouragement, either overt

> or covert, that the choice must in law be deemed to be that of the State. E.g., ibid. [citing additional cases]. See *American, p. 1712.*
>
> ...state action requires both an alleged constitutional deprivation "caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible," and that "the [***144] party charged with the deprivation must be a person who may fairly be said to be a state actor." *Lugar, v. Edmondson Oil Co., 457 U.S. 922, 937, 73 L. Ed. 2d 482, 102 S. Ct. 2744 (1982)*; see *Flagg Bros., Inc. v. Brooks, 436 U.S. 149,156, 56 L. Ed. 2d 185, 98 S. Ct. 1729 (1978). Id. 1712.*

Given the varied duties imposed on the rating organization by the Workers Compensation Act and its central role in the rate-making and appeals process, and its supervision by the commissioner, and having a cabinet level board member on its Board, it is submitted that the Pennsylvania Compensation Rating Bureau is a state actor for determining the due process rights of the petitioners. It was the creator of Rule XVI, which petitioners argued was repugnant and which denied them due process, being the gravamen of their complaint against the PCRB. *Blum v. Yaretsky, 457 U.S. 991, 1004, 73 L. Ed. 2d 534, 102 S. Ct. 2777, at 1004 (1982).*

III. THE DENIAL OF DUE PROCESS RESULTED IN A DEPRIVATION OF A SUBSTANTIAL PROPERTY INTEREST.

It seems apparent without argument, that the loss of $140,000.00 in contract damages, plus interest, and the loss of the ability to pursue and recover punitive damages,

attorneys fees and costs under Pennsylvania's "bad faith statute," 42 Pa.C.S. § 8371 describes a substantial deprivation of property.

CONCLUSION

The outcome of this case is so palpably unfair, that justice requires that the outcome be reversed and that petitioners be granted a hearing on the merits. As the Superior Court stated in its opinion:

> We are sympathetic to Appellants' position that it is unfair that requests for review of insurance rate structures as applied by an insurer are governed by rules that are not readily identifiable and accessible to the general public. While we might like to decide this case differently, we are forced to acknowledge that something that seems "unfair" is not always unconstitutional. (Appendix 20a).

Petitioners have demonstrated that the appeals rules were not readily identifiable to anyone, except to those who fortuitously knew of their existence. "Unfair due process," is no due process at all. Due process cannot be based upon fortuity. For all of the foregoing reasons, petitioners respectfully request that this Court issue a Writ of Certiorari to the Supreme Court of Pennsylvania.

Respectfully submitted,

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